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Every Step You Take, They'll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex Offenders

by SARAH SHEKHTER*

Inspection functions ceaselessly. The gaze is alert everywhere.¹

Introduction

In August 2008, Phillip Garrido was arrested and charged with kidnapping Jaycee Lee Dugard, having two daughters with her, and keeping all three captive in his backyard compound for 18 years.² Seven years earlier, California state authorities determined Garrido to be a low-risk sex offender and in 2008, they fitted him with a Global Positioning System ("GPS") monitoring device.³ Garrido was fitted with the device after the passage of Proposition 83 ("Jessica's Law"), which mandated that every felony sex offender in the state

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1. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 195 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

2. Jaxon Van Derbeken, Henry K. Lee & Kevin Fagan, *18 Years of Missed Chances to Find Kidnap Victim*, S.F. CHRON., Aug. 29, 2009, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/08/28/BAT219F97H.DTL>.

3. Sam Stanton, *New Details Emerge of Garrido Parole Supervision*, SACRAMENTO BEE, Apr. 17, 2010, at 1A, available at <http://www.sacbee.com/2010/04/17/2685242/new-details-emerge-of-garrido.html> ("[O]n April 14, 2008, Garrido was fitted with a GPS monitoring device. The internal review found that when the GPS tracks were viewed on a satellite map it was obvious Garrido 'was frequently present in the rear portion of his backyard, where Jaycee Dugard was allegedly kept.' 'The parole file does not indicate whether a parole agent ever elected to use the satellite view of the Google map and zoom in on Garrido's residence to such detail that Garrido's travel around the rear portion of his back yard would have been apparent,' the documents state. 'The sample review also suggests that Garrido's GPS signal was frequently unavailable without explanation for parts of the day.'").

wear a GPS device for the rest of his or her life.⁴ The proposition was named after Jessica Lunsford, a 9-year-old girl who was abducted, raped, and murdered by a 47-year-old man.⁵ Proponents of the statute argued that monitoring sex offenders by GPS would prevent the victimization of children like Jessica Lunsford.⁶ Unfortunately, Garrido presents just one example of a sex offender realizing society's nightmares, even while complying with GPS surveillance.⁷

Everyone from law enforcement to legislators to victims' rights advocates have heralded GPS technology as the new solution to the problems facing modern penology. Law enforcement and legislators parade GPS to the public as a safe, cost-effective alternative to incarceration.⁸ But are ankle bracelets the solution? Do these devices improve public safety? Or is this logic riddled with "technofallacies?"⁹ Can this new technology rise above the current setbacks that hinder its implementation and justify casting a wide net of social control?

4. S.B. 588, 2005-2006 Sen. Comm., Reg. Sess. (Cal. 2005-2006).

5. Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911 (2010).

6. See *supra* note 4.

7. Elliott C. McLaughlin & Patrick Oppmann, *Sex Offender Kills Teens While Under GPS Monitoring, Police Say*, CNN, Mar. 12, 2009, available at <http://www.cnn.com/2009/CRIME/03/12/sex.offender.gps> (homeless registered sex offender tried to unsuccessfully rape 13-year-old girl, then beat and stabbed her to death, all while wearing functioning GPS bracelet); Melissa Pinion-Whitt, *Sex Offender Wearing GPS Bracelet Molests Fontana Girl*, SAN BERNARDINO COUNTY SUN, Apr. 21, 2010, available at http://www.sbsun.com/breakingnews/ci_14929032.

8. NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 215 (1990); Katherine Mieszkowski, *Tracking Sex Offenders with GPS*, SALON.COM, Dec. 19, 2006, available at <http://www.salon.com/news/feature/2006/12/19/offenders/index.html> ("[I]n his TV interview, [Los Angeles state Sen. George] Runner stressed that wearing a GPS bracelet would not just help law enforcement keep track of sex offenders, it would prevent repeat crimes. 'We believe . . . people will behave differently because they know that somebody can check out where they've been,' he said. He suggested that wearing an electronic monitoring device for life is not only good for public society, it's good for the reformed offender, who will be able to prove his alibi every time a new sex crime is committed.").

9. See R.P. Corbett & G.T. Marx, *No Soul in the New Machine: Technofallacies in the Electronic Monitoring Movement*, 8 JUST. Q. 399, 402 (1991) (listing the fallacies or underlying assumptions of electronic monitoring as: "fallacy of explicit agendas; fallacy of novelty; fallacy of intuitive appeal or surface plausibility; fallacy of the free lunch or painless dentistry; fallacy of quantification; fallacy of ignoring the recent past; fallacy of technical neutrality; fallacy of the 100% accurate or fail-safe system; fallacy of the sure shot; fallacy of assuming that if a critic questions the means, he or she must be opposed to the ends.").

GPS devices track the movements of those who wear them 24 hours a day.¹⁰ The device is about the size of a bar of soap and the offender must wear it on his ankle, charging its battery twice a day, everyday for about an hour.¹¹ Today, in California nearly 6,500 sex offenders wear the GPS monitoring devices,¹² the largest use of GPS monitoring anywhere in the world.¹³ The use of the devices cost the state approximately \$65 million per year.¹⁴ Numerous states have copied California and expanded the idea by applying these devices to other populations, such as gang members,¹⁵ domestic abusers,¹⁶ and even violent burglars.¹⁷ So far, California has only succeeded in strapping a GPS device to every registered sex offender *on parole*.¹⁸ If it proceeds with *lifetime* surveillance, as required by Jessica's Law, it will set precedent, raising both legal and practical issues.

A proper analysis of the constitutional issues surrounding electronic surveillance of parolees, probationers, and the released is warranted before further implementation. In recent decisions, the courts have analyzed the constitutionality of other legislation directed toward sex offenders by applying a minimal level of scrutiny.¹⁹

10. CAL. DEPT. OF CORRS. AND REHAB., JESSICA'S LAW IMPLEMENTATION FACT SHEET (2007), *available at* http://www.cdcr.ca.gov/Parole/Sex_Offender_Facts/docs_SOMB/JessicasLawFactSheet_110807.pdf.

11. Marcus Nieto & David Jung, *The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Overview*, CALIFORNIA RESEARCH BUREAU 40 (2006); Demian Bulwa, *State to Expand Tracking of Parolees with GPS*, S.F. CHRON., Jan. 24, 2010, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/01/24/MN9F1B181D.DTL>.

12. CAL. DEPT. OF CORRS. AND REHAB., JESSICA'S LAW: PAROLE STATISTICAL DATA FOR JANUARY 2010 (2010), *available at* http://www.cdcr.ca.gov/Parole/Sex_offender_facts/Jessicas_Law.html.

13. CAL. SEX OFFENDER MGMT. BD., RECOMMENDATIONS REPORT 48 (2010), *available at* http://www.cce.csus.edu/conferences/cdcr/casomb/docs/CASOMB%20Report%20Jan%202010_Final%20Report.pdf.

14. *Id.*

15. CAL. DEPT. OF CORRS. AND REHAB., ANNUAL REPORT 5 (2009), *available at* http://www.cdcr.ca.gov/News/2009_Press_Releases/docs/CDCR_Annual_Report.pdf.

16. Ariana Green, *More States Use GPS to Track Abusers*, N.Y. TIMES, May 8, 2009, *available at* http://www.nytimes.com/2009/05/09/us/09gps.html?_r=2.

17. Tovia Smith, *State Plans GPS Tracking for Violent Burglars*, NPR NEWS, Aug. 20, 2007, *available at* <http://www.npr.org/templates/story/story.php?storyId=13764509>.

18. CAL. DEPT. OF CORRS. AND REHAB., *supra* note 15, at 5.

19. *Smith v. Doe*, 538 U.S. 84, 105 (2003) (holding that retroactive application of sex offender registration statute does not violate ex post facto clause, because the government regulatory scheme is nonpunitive and "[t]he legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their

Federal and state courts have upheld legislation curtailing First and Fifth Amendment protections as well as substantive due process protections of convicted sex offenders.²⁰ They have found that the government interest in public safety is legitimate and outweighs minimal, nonpunitive measures regulating the imprisoned and newly released.²¹ The aforementioned courts repeatedly distinguish the sex offender population from other formerly incarcerated, because of their higher propensity for reoffending.²² However, no studies demonstratively conclude that GPS monitoring decreases recidivism.²³ The legal and practical problems with widespread usage of this fledgling technology have yet to be addressed thoroughly in both the courts and the legislature. Lifetime GPS monitoring of the formerly incarcerated raises myriad legal issues, which will be addressed piecemeal by this note.

First, this note will explore the increased usage by law enforcement of electronic surveillance technology and past constitutional challenges to this technology to set the context for the current situation. The next part will summarize constitutional challenges to other, similar sex offender legislation, specifically registration requirements and residency restrictions. Then, this note will reexamine the constitutional challenges to surveillance

dangerousness as a class.”); *McKune v. Lile*, 536 U.S. 24, 29, 34 (2002) (Kansas’ Department of Correction’s Sexual Abuse Treatment Program does not violate Fifth Amendment right against self-incrimination by requiring inmates convicted of sex offenses to admit to the acts, because the rehabilitation program “serves a vital penological purpose [as sex offenders are more likely to reoffend upon release], and offering inmates minimal incentives to participate does not amount to compelled self-incrimination prohibited by the Fifth Amendment.”); *Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 764 (7th Cir. 2004) (banning convicted sex offenders from city parks does not violate First Amendment or Due Process Clause, because city has compelling interest in preventing sex offender from “going to the park in search of children to satisfy deviant desires”).

20. See *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005); *Doe v. Miller*, 405 F.3d 700, 710 (8th Cir. 2005); *State v. Seering*, 701 N.W.2d 655, 665 (Iowa 2005); *People v. Leroy*, 828 N.E.2d 769, 776–77 (Ill. App. Ct. 2005).

21. *Id.*

22. *McKune*, 536 U.S. at 34 (“[W]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”).

23. CAL. SEX OFFENDER MGMT. BD., GPS RESPONSE LETTER TO CDCR SECRETARY 7–12 (Dec. 20, 2007), available at <http://www.cce.csus.edu/conferences/cdcr/casomb/docs/CDCR%20GPS%20Letter%20Final.pdf>. See also CAL. SEX OFFENDER MGMT. BD., *supra* note 13, at 94–96 (summarizing studies from California, Tennessee, New Jersey, North Carolina, and Maryland all showing that GPS monitoring alone does not reduce recidivism).

technology and sex offender legislation, applying their analyses to lifetime monitoring of sex offenders. Ultimately, this note will argue that lifetime GPS monitoring threatens the protections of the Fourth Amendment, the *ex post facto* clause and the Fourteenth Amendment. GPS monitoring potentially violates the Fourth Amendment, because it grants law enforcement license to search sex offenders, without qualification or consideration for the procedural safeguards guaranteed by the Constitution.²⁴ Applying GPS monitoring retroactively violates the *ex post facto* clause as it subjects its target population to a punitive regime of surveillance.²⁵ As for the Fourteenth Amendment, GPS surveillance fails to surpass even a minimal threshold of scrutiny, because research shows it does not further the goals it purports to achieve.²⁶ Finally, this note will discuss the policy implications of using GPS devices.²⁷ It will ultimately conclude that, beyond issues of constitutionality, GPS monitoring raises serious concerns for society, both in terms of its costs and potential infringement on civil liberties.

I. History of GPS Monitoring Devices ("The Magic Bracelet")²⁸

The history of using technology to monitor certain populations dates back to the beginning of the century.²⁹ The first known case often cited for popularizing the use of monitoring devices on criminals goes back to Judge Jack Love of Albuquerque, New Mexico's Second Judicial District.³⁰ Judge Love drew inspiration from a Spiderman story in which the villain attached a monitoring device to Spiderman's ankle.³¹ In 1983, as an alternative to incarceration, he placed a device on an offender who violated

24. *See infra* Part IV, A.

25. *See infra* Part IV, B.

26. *See infra* Part IV, C.

27. *See infra* Part V.

28. DICK WHITFIELD, *THE MAGIC BRACELET: TECHNOLOGY AND OFFENDER SUPERVISION* (2001).

29. *Id.* at 9. *See* Renee Hutchins, *Tied Up in Knots: GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 410-14 (2007); MORRIS & TONRY, *supra* note 8, at 215.

30. WHITFIELD, *supra* note 28, at 10.

31. *Id.*

probation.³² Since then, monitoring criminals has only grown in popularity.³³

The devices work through one of three mechanisms: active, passive, or hybrid GPS monitoring.³⁴ Active systems transmit the location information of an offender to a monitoring center in real time.³⁵ Passive systems store location and time data, and the information must be downloaded at a monitoring center.³⁶ Hybrid systems report a few times each day, like a passive system, unless the offender goes out of range or tampers with the device, in which case it sends signals in real-time like the active systems.³⁷

In California, GPS usage has risen as a consequence of Jessica's Law and a pandemic overcrowding of the prison system.³⁸ The purpose behind Jessica's Law was to decrease recidivism and relieve the costs of the prison system.³⁹ The judiciary acknowledged the overcrowding in 2009, when a three-judge panel from the U.S. District Court for the Eastern District of California mandated a release order in its combined decision of *Coleman v. Schwarzenegger* and *Plata v. Schwarzenegger*.⁴⁰ The California Department of Corrections and Rehabilitation ("CDCR") responded by proposing GPS ankle bracelets as an intermediate sanction that would allow

32. *Id.*

33. *Id.* at 11; Bulwa, *supra* note 11 ("[C]alifornia will now strap GPS anklets on 1,000 recently paroled gang members this year Some crime suspects who make bail before trial have been outfitted. In Texas, some schools are forcing truant students to carry GPS units. Domestic abusers and stalkers in Massachusetts are strapped up in an attempt to enforce restraining orders.").

34. INT'L ASS'N OF CHIEFS OF POLICE, TRACKING SEX OFFENDERS WITH ELECTRONIC MONITORING TECHNOLOGY: IMPLICATIONS AND PRACTICAL USES FOR LAW ENFORCEMENT 5 (2008), <http://www.ojp.usdoj.gov/BJA/pdf/IACPSexOffenderElecMonitoring.pdf>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *See supra* notes 4–6 and accompanying text.

39. *Supra* note 4 ("Sex offenders have very high recidivism rates. According to a 1998 report by the U.S. Department of Justice, sex offenders are the least likely to be cured and the most likely to reoffend, and they prey on the most innocent members of our society.").

40. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *24 (E.D. Cal. Aug. 4, 2009). Plaintiffs in *Plata* and *Coleman* filed motions to convene a three-judge court to limit prison population, pursuant to the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626(a)(3)(B) (2006).

early release of inmates without sacrificing public safety.⁴¹ So far, the devices have been strapped to sex offenders and, in one pilot project, to gang members.⁴² CDCR currently uses both active and passive monitoring. Parolees categorized as High Risk Sex Offenders (“HRSO”) are subject to active GPS monitoring, while all other sex offenders are subject to passive GPS monitoring.⁴³

The trend of increased GPS usage is not limited to California. Other states have followed California’s lead by proposing GPS monitoring of sex offenders, domestic abusers and violent burglars.⁴⁴ Politicians in other states are turning to GPS for mainly the same reasons that caused a speedy adoption of GPS in California, namely growing prison populations and shrinking budgets.⁴⁵ Maryland’s Senate approved lifetime monitoring of sex offenders in April 2010, which may include GPS monitoring.⁴⁶ At least twelve states have passed legislation that would force domestic abusers to wear GPS devices to ensure enforcement of their restraining orders.⁴⁷

II. Constitutionality of Electronic Monitoring

In *Katz v. United States*, the Supreme Court examined whether warrantless government surveillance of individuals can withstand

41. *Supra* note 4; Press Release, CAL. DEPT. OF CORRS. AND REHAB., Population Management Plan (Sept. 18, 2009), http://www.cdcr.ca.gov/News/2009_Press_Releases/Sept_18.html; Thomas Watkins, *Amid Budget Crisis, California Makes Parole Easier*, ASSOCIATED PRESS, Mar. 24, 2010, available at http://www.mercurynews.com/politics-government/ci_14752504.

42. CAL. DEPT. OF CORRS. AND REHAB., *supra* note 15, at 5; Bulwa, *supra* note 11.

43. CAL. SEX OFFENDER MGMT. BD., GPS RESPONSE LETTER, *supra* note 23, at 4.

44. Anne Holcomb, *Michigan Will Join States that Use GPS to Track Domestic Abusers, Stalkers*, KALAMAZOO NEWS ARCHIVE, July 29, 2008, available at http://blog.mlive.com/kzgazette/2008/07/michigan_will_join_states_that.html; *Illinois Eyes GPS Use in Tracking Restraining Orders*, NPR, Apr. 2, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=89318803>; Wendy Koch, *More Sex Offenders Tracked by Satellite*, USA TODAY, June 6, 2006, available at http://www.usatoday.com/tech/news/techinnovations/2006-06-06-gps-tracking_x.htm; Mieszkowski, *supra* note 8.

45. WHITFIELD, *supra* note 28, at 11.

46. *Md. Senate Backs More Sex Offender Supervision*, ASSOCIATED PRESS, Apr. 10, 2010, available at <http://wjz.com/local/senate.sex.offender.2.1624543.html> (“[S]upervision will vary by individual but could include GPS monitoring or in person visits.”).

47. Ariana Green, *More States Use GPS to Track Abusers*, N.Y. TIMES, May 8, 2009, available at http://www.nytimes.com/2009/05/09/us/09gps.html?_r=2 (also noting that about 5,000 domestic abusers are being tracked nationwide).

Fourth Amendment challenges.⁴⁸ Justice Harlan's concurrence set out the test most commonly cited today: a person can only claim Fourth Amendment protection if he or she "exhibited an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.'"⁴⁹ Henceforth, the Court found that surveillance by law enforcement only violated Fourth Amendment rights against unconstitutional searches and seizures if the defendant had a reasonable expectation of privacy.⁵⁰

However, the Supreme Court demonstrated in *United States v. Knights* and *Samson v. California* that these protections are malleable and can be sacrificed for the sake of legitimate state interests.⁵¹ The Supreme Court held in *United States v. Knights* and *Samson v. CA*, that probationers and parolees, respectively, have lower expectations of privacy and thus cannot claim Fourth Amendment violations when searched by their parole officers or other peace officers without reasonable suspicion.⁵² In both cases, the legitimate government interest in searching these potentially dangerous individuals trumped their claims to privacy. A California court extended this logic to

48. *Katz v. United States*, 389 U.S. 347, 352 (1967) (holding that petitioner had legitimate expectation of privacy in public telephone booth).

49. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

50. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that use of sense-enhancing technology to gather information regarding interior of home that could not otherwise have been obtained without physical intrusion into constitutionally protected area constitutes a "search" and use of thermal imaging to measure heat emanating from home was search); *Minnesota v. Carter*, 525 U.S. 83, 90 (1998) (holding that defendants, who were in another person's apartment for a short time solely for the purpose of packaging cocaine, had no legitimate expectation of privacy in the apartment, and, thus, any search which may have occurred did not violate their Fourth Amendment rights); *Florida v. Riley*, 488 U.S. 445, 445 (1989) (holding that police officer's observation, with his naked eye, of interior of partially covered greenhouse in residential backyard from vantage point of helicopter circling 400 feet above did not constitute a "search" for which a warrant was required); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (holding that warrantless aerial observation of fenced-in backyard within curtilage of home was not unreasonable under the Fourth Amendment).

51. *Samson v. California*, 547 U.S. 843, 846 (2006) (holding that parolees are entitled some minimum requirements of due process in revocation hearings); *United States v. Knights*, 534 U.S. 112, 120 (2001) (holding that California law allowing search or seizure of parolee without suspicion is constitutional); Patricia L. Eichar, *Review of Selected 2005 California Legislation: Penal: Chapter 484: From Home Detention to GPS Monitoring*, 37 MCGEORGE L. REV. 284, 292-93 (2006) (summarizing the goals of Chapter 484, California legislation that would allow officials to better supervise high-risk probationers and parolees, as reducing recidivism and number of crime victims).

52. *Samson*, 547 U.S. at 846; *Knights*, 534 U.S. at 120.

convicts, holding that they too have a lower expectation of privacy.⁵³ However, the courts have left unanswered the specific question of the constitutionality of surveillance beyond the scope of parole or probation. Consequently, we must narrow our focus to case law involving criminal investigations in order to understand the constitutionality of surveillance more generally.⁵⁴

In the context of searches or surveillance in pursuit of a criminal investigation, the circuit courts have arrived at different conclusions regarding the usage of GPS devices,⁵⁵ while the Supreme Court has yet to decide the issue.⁵⁶ In *United States v. Maynard*, the District of Columbia Circuit Court of Appeals reasoned that the positioning of a GPS device on the petitioner's vehicle constituted a search because it was used "to track [the petitioner's] movements 24 hours a day for 28 days as he moved among scores of places, thereby discovering the totality and pattern of his movements from place to place to place."⁵⁷ In contrast, the Ninth Circuit and Seventh Circuit Courts of Appeal focused not on the duration of the tracking, but rather paralleled the method of tracking to hypothetically permissible methods to conclude

53. *People v. Adams*, 115 Cal. App. 4th 243, 258 (2004) ("[D]efendant's assertion that this court must identify a 'special needs' beyond the normal need for law enforcement before undertaking a balancing analysis overlooks the fact that the class of persons subject to the Act is convicted criminals, not the general population. As stated above, convicted criminals do not enjoy the same expectation of privacy that nonconvicts do.") (citations omitted).

54. See *Hutchins*, *supra* note 29, at 445–52.

55. *United States v. Maynard*, 615 F.3d 544, 555 (D.C. Cir. 2010) (holding use of GPS device to monitor vehicle's movements for a month constituted a search); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1217 (9th Cir. 2010) (holding placement of GPS device on vehicle did not constitute a search); *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (holding use of GPS device on a vehicle did not constitute a seizure or a search); *Hutchins*, *supra* note 29, at 454 ("[A]fter reviewing the decisions of the lower federal and state courts and the available scholarship, the question still remains whether the Constitution in any way limits law enforcement's use of GPS-enhanced surveillance."); April A. Otterberg, *GPS Tracking Technology: The Case for Revisiting Knotts and Shifting the Supreme Court's Theory of the Public Space Under the Fourth Amendment*, 46 B.C. L. REV. 661, 680 (2005) ("only a few courts have mentioned the possible constitutional implications of the monitoring of GPS tracking devices. Two federal courts have ignored or declined to address the monitoring issue, another federal court has held monitoring a GPS device was not a search by relying on the *Knotts* reasoning, and two state courts have held monitoring a GPS device constituted a search on state law grounds.").

56. Otterberg, *supra* note 55, at 680.

57. *Maynard*, 615 F.3d at 558.

that GPS monitoring does not constitute a search.⁵⁸ No precedent offers a definitive test on how to analyze government surveillance. As such, we must look to judicial reasoning in other similar areas for guidance.

III. Constitutionality of Sex Offender Registration Requirements and Residency Restrictions

As GPS surveillance of sex offenders has yet to be challenged, we must examine other similar legislation to set the groundwork for potential future claims. Lifetime surveillance shares two commonalities with registration requirements and residency restrictions. First, all three legislative enactments target the same population of convicted sex offenders. Second, all three pose similar threats to the constitutional protections of the *ex post facto* clause and the due process clause. As such, a proper examination of challenges to the latter two restrictions can guide a future analysis of lifetime surveillance.

A. Ex Post Facto Challenges

Many states have adopted monitoring requirements as part of legislative bundles aimed at controlling sex offender populations in their communities.⁵⁹ Currently, sex offender registration and community notification laws exist in every state.⁶⁰ Most of these registration requirement statutes include:

Name and any aliases, address, date of birth, social security number, photograph and/or physical description, fingerprints, the type of offense the person was convicted of, the age of the victim, the date of conviction, the punishment received, any vehicles registered to the offender, and the place of

58. *Pineda-Moreno*, 591 F.3d at 1217; *Garcia*, 474 F.3d at 997.

59. All fifty states now have sex-offender registration statutes as a result of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2010). See Chiraag Bains, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L. L. REV. 483, 483–84 n.5 (2007) (citing legislation in twenty-two states that expands upon basic registration requirements).

60. Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 213, 213 (Bruce J. Winick & John Q. La Fond eds., American Psychological Association 2003).

employment or school. A few jurisdictions also require that the sex offender provide a blood sample for DNA evidence.⁶¹

Notification statutes allow the public to access information about registered sex offenders, typically based on the degree of risk the offenders are thought likely to present.⁶² Most states allow the information to be accessed through a phone hotline or the internet.⁶³

Sex offender registration requirements and notification statutes have been challenged jointly as violations of the *ex post facto* clause.⁶⁴ The clause prohibits laws that change or increase a punishment for a crime retroactively.⁶⁵ The threshold question in determining constitutionality of such legislation is whether it is punitive or civil in intent.⁶⁶ In *Kennedy v. Mendoza-Martinez*, the Supreme Court set out the test for determining whether a sanction is a punishment and thus qualifies as punitive. Courts should examine the following factors:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned⁶⁷

If the courts find that the legislature indeed intended a civil regulatory scheme, then the courts must further examine whether the

61. Megan A. Janicki, *Better Seen than Herded: Residency Restrictions and Global Positioning System Tracking Laws for Sex Offenders*, 16 B.U. PUB. INT. L.J. 285, 289 (2007) (quoting KAREN J. TERRY & JOHN S. FURLONG, SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A “MEGAN’S LAW” SOURCEBOOK I-8 (2d ed. 2004)).

62. *Id.*

63. *Id.*

64. U.S. CONST. art. I, §§ 9, cl. 3, 10, cl. 1; *Smith v. Doe*, 538 U.S. 84, 101 (2003); *Doe v. Miller*, 405 F.3d 700, 718 (8th Cir. 2005). *See also Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178, 1180 (E.D. Cal. 2007); *In re E.J.*, 47 Cal. 4th 1258, 1264 (2010); *People v. Grant*, 20 Cal. 4th 150, 153 (1999).

65. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

66. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

67. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

effect is so punitive that it negates the intent.⁶⁸ However, the courts ordinarily defer to the legislature's stated intent, so "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."⁶⁹

Courts have upheld retroactive restrictions as constitutional in a number of recent cases, concluding they are not punitive in nature.⁷⁰ *Kansas v. Hendricks* set out the analysis for determining whether restrictions on the liberties of sex offenders should be deemed punitive and thus unconstitutional.⁷¹ In that case, Hendricks challenged Kansas' Sexually Violent Predator Act (1994), which established the procedures for civil commitment of those defined as "sexually violent predators" by the language of the act.⁷² The Supreme Court upheld the statute, concluding that neither the language of the statute nor its effect serve any punitive purpose such as deterrence or retribution.⁷³ The court rejected the argument that the form of civil commitment at issue poses an indefinite duration and thus serves a punitive purpose.⁷⁴ Similarly, in *Smith v. Doe*, the Supreme Court concluded that Alaska's Sex Offender Registration Act did not, by intent or effect, create a punishment.⁷⁵ The statute contained a registration requirement and notification system that both applied retroactively.⁷⁶ The Court found that Alaska intended to establish a civil regulatory scheme based on the statute's language

68. *United States v. Ward*, 448 U.S. 242, 248–49 (1980).

69. *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *Ward*, 448 U.S. at 249). See also *Hendricks*, 521 U.S. at 361; *United States v. Ursery*, 518 U.S. 267, 290 (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984).

70. *Smith*, 538 U.S. at 101; *Miller*, 405 F.3d at 719. See also *Doe v. Schwarzenegger*, 476 F. Supp. 2d at 1182 (holding that the statute must be interpreted to apply prospectively unless it specifically states otherwise); *In re E.J.*, 47 Cal. 4th at 1272 (holding that the statute must be interpreted to apply prospectively unless it specifically states otherwise).

71. *Hendricks*, 521 U.S. at 361.

72. *Id.* at 350–51.

73. *Id.* at 361–62 ("[H]ere, Kansas' objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, instead of the criminal code as well as its description of the Act as creating a 'civil commitment procedure.'" (citations omitted)).

74. *Id.* at 363 ("Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.").

75. *Smith*, 538 U.S. at 105–06.

76. *Id.* at 89.

and structure.⁷⁷ The language of the statute specifically identifies public safety as its primary interest.⁷⁸ Also, the statute's location in the State's Health, Safety, and Housing Code further evidences its civil rather than criminal intent.⁷⁹

B. Due Process Challenges

The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law."⁸⁰ Procedural due process claims typically arise when a person asserts that the government deprived him of life, liberty, or property through inadequate or unfair procedures.⁸¹ Substantive due process claims arise when a person asserts that the government deprived him of a fundamental interest, "objectively, 'deeply rooted in this Nation's history and tradition.'"⁸² First, the court must determine whether a right was deprived.⁸³ If a "fundamental" right is at issue, the court must employ a strict scrutiny analysis.⁸⁴ Government action that infringes on a fundamental right will only be upheld if the means of accomplishing the goal are "narrowly tailored to serve a compelling state interest."⁸⁵

Courts have analyzed challenges to the constitutionality of registration requirements and residency restrictions by applying rational basis scrutiny.⁸⁶ In *Doe v. Miller*, the Eighth Circuit Court of Appeals applied rational basis scrutiny and concluded that residency

77. *Id.* at 105.

78. *Id.* at 94–95 ("Where a legislative restriction 'is an incident of the State's power to protect the public health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'") (citations omitted).

79. *Id.* at 85–86.

80. U.S. CONST. amend. XIV, § 1.

81. Bains, *supra* note 59, at 489 ("[t]o determine what procedures are due: the court balances the government's interest against the private interest of the plaintiffs, the risk of erroneous deprivation, and the value added by an oral hearing.").

82. *Washington v. Glucksberg*, 521 U.S. 720, 720–21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

83. *See State v. Seering*, 701 N.W.2d 655, 665 (Iowa 2005).

84. *Foucha v. Louisiana*, 504 U.S. 71, 115 (1992) (Thomas, J., dissenting).

85. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

86. *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005); *Doe v. Miller*, 405 F.3d 700, 710 (8th Cir. 2005); *State v. Seering*, 701 N.W.2d 655, 665 (Iowa 2005); *People v. Leroy*, 828 N.E.2d 769, 776–77 (Ill. App. Ct. 2005).

restrictions rationally advance a legitimate governmental purpose.⁸⁷ More specifically, rational basis scrutiny is appropriate because the restrictions did not implicate the fundamental right to travel and the restrictions are related to the state's interest in promoting the safety of children.⁸⁸

IV. Constitutionality of Lifetime GPS Monitoring of Sex Offenders

Lifetime GPS monitoring extends government intrusion beyond the restrictions already discussed. Although registration requirements and residency restrictions have surpassed rational basis scrutiny, GPS monitoring poses distinct challenges to the *ex post facto* clause and the Fourteenth Amendment Due Process Rights.

A. Fourth Amendment Challenges

Upon completing the conditions of their parole, sex offenders should regain the constitutional rights guaranteed to all citizens.⁸⁹ The Supreme Court justified suspicionless searches and seizures of parolees, because of the nature of parole itself as well as the inherent dangerousness of parolees.⁹⁰ As Chief Justice Burger explained in *Morrissey v. Brewer*, “parole is an established variation on imprisonment of convicted criminals,” and “[i]ts purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed.”⁹¹ Therefore, surveillance suits the purpose of parole by helping those subjected to it avoid re-imprisonment. In contrast, registered sex offenders have completed the transition phase of parole and thus should not have their Fourth Amendment protections curtailed.

87. *Miller*, 405 F.3d at 714 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

88. *Id.*

89. *Bliss v. Franco*, 446 F.3d 1036, 1044 (10th Cir. 2006) (“[M]s. Bliss’s probation, however, had already been discharged when the probation officers visited her home in June 2001. Thus, she enjoyed the full protection of the Fourth Amendment, including the clearly established right to be free from warrantless searches of her home.”). *See generally* CAL. PENAL CODE § 3000 (2010) (describing the goal of parole as preparing an offender for successful reintegration into society and positive citizenship).

90. *Morrissey v. Brewer*, 408 U.S. 471, 477–94 (1972); *Samson v. California*, 547 U.S. 843, 853 (2006); *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).

91. *Morrissey*, 408 U.S. at 477.

Instead, GPS monitoring should be analyzed as a search under Fourth Amendment jurisprudence and should only be executed on the basis of probable cause.⁹² Applying the aforementioned test from *Katz v. United States*, 24-hour surveillance intrudes on a reasonable expectation of privacy individuals have in the daily activities of their personal lives.⁹³ As the District of Columbia Court of Appeals noted: “Whether an expectation of privacy is reasonable depends in large part upon whether that expectation relates to information that has been ‘expose[d] to the public.’”⁹⁴ The fact that GPS monitoring revealed “the totality of [the petitioner’s] movements over the course of a month” persuaded the court that the final information revealed was not exposed to the public and thus violated a reasonable expectation of privacy.⁹⁵ Here, lifetime surveillance far surpasses the intrusiveness of one month’s surveillance of an individual’s vehicle.⁹⁶ The lack of any discrete judicial decisions justifying disparate treatment of released offenders no longer on probation or parole indicates that the infringement is improper.⁹⁷

B. Ex Post Facto Challenges

To determine whether Jessica’s Law could violate the *ex post facto* clause, courts engage in a two-step test. First, the courts must

92. *United States v. Maynard*, 615 F.3d 544, 561 (D.C. Cir. 2010); *People v. Weaver*, 12 N.Y.3d 433, 447 (2009).

93. *Katz v. United States*, 389 U.S. 347, 352 (1967). *See also Weaver*, 12 N.Y.3d at 442 (finding GPS surveillance “yields and records with breathtaking quality and quantity . . . a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and vocational pursuits.”).

94. *Maynard*, 615 F.3d at 558 (quoting *Katz*, 389 U.S. at 351).

95. *Id.* at 560 (“[W]e hold the whole of a person’s movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil.”).

96. *State v. Jackson*, 150 Wash. 2d 251, 262 (Wash. 2003) (“[F]or example, the device can provide a detailed record of travel to doctors’ offices, banks, casinos, tanning salons, places of worship, political party meetings, bars, grocery stores, exercise gyms, places where children are dropped off for school, play, or day care, the upper scale restaurant and the fast food restaurant, the strip club, the opera, the baseball game, the ‘wrong’ side of town, the family planning clinic, the labor rally.”).

97. *See also* Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1193 (2005) (arguing that ex-offenders deserve a higher level of scrutiny under the equal protection clause analysis); Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1345–64 (arguing that courts improperly overlook the threat to liberty posed by emerging technologies such as GPS tracking bracelets, biometric scanners, online offender indexes and DNA databases).

determine whether the California legislature intended the statute to be punitive or civil.⁹⁸ One helpful indicator of intent is how the statute was codified. GPS monitoring was enacted by an amendment to California's Penal Code, which would seemingly indicate the statute as punitive.⁹⁹ However, the Supreme Court only weighs such formal attributes as probative, not dispositive.¹⁰⁰ The language of the original bill reads: "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution The facts constituting the necessity are: In order to protect public safety by ensuring that sex offenders are electronically monitored, it is necessary that this act take effect immediately."¹⁰¹ The arguments in favor of enacting the statute stressed the dangerousness of sex offenders, their high levels of recidivism, and the lack of state control over them after prison.¹⁰² The bill's intent is "to help Californians better protect themselves, their children, and their communities; it is not the intent of the people to embarrass or harass persons convicted of sex offenses."¹⁰³ A court would most likely not find the intent of the statute to be punitive, because of the emphasis on public safety concerns.¹⁰⁴

If the statute is deemed non-punitive in intent, then courts must analyze whether the effect is punitive under the criteria set out by *Kennedy v. Mendoza-Martinez*.¹⁰⁵ In *Smith v. Doe*, the Supreme

98. *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citing *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

99. CAL. PENAL CODE § 3004(b) (2010).

100. *Smith*, 538 U.S. at 94 (finding that the Alaska Sex Offender Registration Act's location within the state's criminal procedure code did not mean that the statute was punitive in intent).

101. S.B. 588, 2005-2006 Sen. Comm., Reg. Sess. (Cal. 2005-2006).

102. *Id.*

103. *Id.*

104. See *People v. Mosley*, 188 Cal. App. 4th 1090, 1107 (2010) (discussing only the residency restrictions provision of Proposition 83 and finding "by a narrow margin" that the statute lacks punitive intent, because of the express statement of regulatory intent).

105. *Kennedy*, 372 U.S. at 168-69 ("[W]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."). See also *Commonwealth v. Cory*, 454 Mass. 559

Court focused on five factors as the most relevant in sex offender registration-notification statutes: (1) whether the restriction “has been regarded in our history and traditions as a punishment;” (2) whether the restriction “imposes an affirmative disability or restrain;” (3) whether the restriction “promotes the traditional aims of punishment;” (4) whether the restriction “has a rational connection to a nonpunitive purpose;” and (5) whether the restriction “is excessive with respect to this purpose.”¹⁰⁶

Despite the fact that GPS monitoring is a relatively recent technological development, it bears similarities to other historically recognized punishments under the second factor of *Mendoza-Martinez*. The closest analogy is public shaming.¹⁰⁷ The GPS devices themselves are large, bulky and noticeable to the public, revealing the wearer as a social deviant. In contrast, constitutionally valid sex offender registration requirements do not readily submit its registrants to public stigmatization.¹⁰⁸

Under the next factor, GPS ankle bracelets are “affirmative disability[ies]” as they must be worn 24 hours a day, strapped to one’s ankle.¹⁰⁹ As the Massachusetts Supreme Court noted, “[t]here is no context other than punishment in which the State physically attaches an item to a person, without consent and also without consideration of individual circumstances, that must remain attached for a period of years and may not be tampered with or removed on penalty of

(Mass. 2009) (holding that retroactive application of statute requiring sex offenders to wear GPS devices violated prohibition against ex post facto laws).

106. *Smith v. Doe*, 538 U.S. at 97.

107. Thomas J. Bamonte, *The Viability of Morrissey v. Brewer and the Due Process Rights of Parolees and Other Conditional Releasees*, 18 S. Ill. U. L.J. 121, 137 (1993) (“[T]he person whose ankle is shackled with an electronic monitoring device, who is confined to home for lengthy periods and whose home can be searched by the authorities based upon little more than a suspicion of wrongdoing lives very differently than the rest of us and under much greater restriction than the parolees in *Morrissey*.”).

108. See *Smith v. Doe*, 538 U.S. at 99 (“[T]he State’s Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety’s Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska’s citizenry.”).

109. *Kennedy*, 372 U.S. at 168.

imprisonment.”¹¹⁰ The device is imposed on the target population for an indefinite duration.¹¹¹ Such surveillance intrudes upon one’s privacy and can restrict one’s ability to travel and employment opportunities.¹¹² As noted in the legislative history behind an electronic monitoring statute, authorities can program exclusion zones where offenders cannot go while wearing the device.¹¹³

The intent of such surveillance is deterrence, one of the traditional aims of punishment, as the language of the statute specifically cites protecting the public from the likely recidivism of sex offenders.¹¹⁴ Lastly, GPS monitoring does not have a rational connection to the alleged nonpunitive purpose of bolstering public safety, specifically because studies show it does not decrease recidivism.¹¹⁵ Moreover, the sanction is imposed upon a largely diverse population without consideration of the type of sex offense each individual committed or each individual’s likelihood of recidivism.¹¹⁶

110. *Cory*, 454 Mass. at 570 (holding GPS surveillance as condition of probation is a retroactive punishment, violative of the *ex post facto* clause).

111. *See also Smith v. Doe*, 538 U.S. at 117 (Ginsburg, J., dissenting) (Discussing sex offender registration and reporting requirements: “. . . the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.”). *Cf. Hendricks*, 521 U.S. at 363–64 (Civil commitment of sex offenders not punitive in nature, because the duration is only “potentially indefinite” and “linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.”).

112. *See Smith v. Doe*, 538 U.S. at 109, n.* (Souter, J., concurring in judgment).

113. S.B. 588, 2005-2006 Sen. Comm., Reg. Sess. (Cal. 2005–2006).

114. *Id.*

115. CAL. SEX OFFENDER MGMT. BD., AN ASSESSMENT OF CURRENT MANAGEMENT PRACTICES OF ADULT SEX OFFENDERS IN CALIFORNIA: INITIAL REPORT 68 (2008), available at <http://www.cce.csus.edu/conferences/cdcr/casomb/docs/SOMBReport1.pdf>.

116. *See Mosley*, 188 Cal. App. 4th at 1110 (“[W]hen a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.”) (quoting *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009)).

C. Due Process Challenges

Lifetime GPS monitoring violates substantive due process, as guaranteed by the Fourteenth Amendment.¹¹⁷ Placing a permanent device on the physical body of an adult, restricting his freedom to travel, oversteps the protections of the Fourteenth Amendment.¹¹⁸ The Supreme Court declared in *United States v. Guest* that the right to travel is a “firmly established” and “repeatedly recognized” constitutional right.¹¹⁹ Because the right to travel is a fundamental right, the government is held to the strict scrutiny analysis. Therefore, any restrictions on the right must be narrowly tailored.¹²⁰ Here, lifetime GPS monitoring provides an overly broad and vague approach to achieving public safety.¹²¹

Unlike residency restrictions, GPS monitoring is not narrowly tailored. The Eighth Circuit in *Doe v. Miller* upheld an Iowa statute prohibiting sex offenders from residing within 2,000 feet of a school or childcare facility.¹²² The petitioners argued the restriction violated a fundamental right “to live where you want.”¹²³ The court rejected that argument as lacking constitutional basis.¹²⁴ Instead, it deferred to

117. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986)).

118. *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969) (holding a constitutionally protected right to travel and striking down legislation that preconditions receipt of welfare benefits on state residency as an undue burden on the right to enter or leave a state).

119. *United States v. Guest*, 383 U.S. 745, 757 (1966) (holding that state action to deprive “Negroes” of right to travel to and from state and to use state’s interstate commerce is an offense under statute pertaining to conspiracy against rights of citizens, because the right to interstate travel is guaranteed by the Constitution).

120. *In re E.J.*, 47 Cal. 4th at 1295 (Moreno, J., dissenting) (“[T]hat right [to intrastate travel] is not absolute, but the infringement may be imposed ‘only as reasonably necessary to further a legitimate governmental interest.’”) (alteration in original) (quoting *People v. Smith*, 152 Cal. App. 4th 1245, 1250 (2007)).

121. *Cf. In re E.J.*, 47 Cal. 4th at 1283 n.10 (“[T]he limited nature of the rights retained by registered sex offenders *while serving out a term of parole*, whether it be with regard to the right to travel, to privacy, or to associate with persons of one’s choosing, must inform the inquiry as to whether section 3003.5(b) places reasonable or unreasonable restrictions on the paroles of registered sex offenders.”).

122. *Doe v. Miller*, 405 F.3d 700, 708 (8th Cir. 2005) (holding that Iowa statute did not violate due process clause of Fourteenth Amendment on its face for lack of notice, although some cities were unable to provide sex offenders with information about location of all schools and registered child care facilities and it was difficult to measure restricted areas, which were measured “as the crow flies” from school or child care facility).

123. *Id.* at 713–14.

124. *Id.* at 714.

the state legislature “to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable” and concluded the restrictions had some rational basis.¹²⁵ Limiting sex offenders access to places where their target populations congregate bears some rationale, despite commentators’ criticisms.¹²⁶ The residency restrictions upheld by the California Supreme Court in *In re E.J.* are similarly narrow as they apply solely to sex offenders on parole.¹²⁷ The court did not discuss the legal implications of such restrictions beyond parole.¹²⁸ To the extent the court discusses the constitutionality and reasonableness of residency restrictions, the court remanded to lower courts to conduct individual factual inquiries in their respective counties.¹²⁹

Unlike the restraint discussed in *Reno v. Flores*,¹³⁰ GPS monitoring does impose restraint. Respondents in *Reno v. Flores* were both juveniles and deportable aliens, therefore the state had a legitimate interest in keeping them in custody. Such a system is not “pursuing an important governmental interest in a manner narrowly tailored to minimize the restraint on liberty.”¹³¹ Instead, a 24-hour, constant monitoring system is unnecessarily intrusive and not proven to improve public safety.¹³² GPS monitoring does violate the right to travel and is not justified by state interest. Although it is reasonable for a state to enact legislation to promote public safety, studies show that GPS monitoring does not further this goal, and therefore cannot be justified as an infringement on liberties.

125. *Id.* at 714–16.

126. *Mosley*, 188 Cal. App. 4th at 1110 (“[R]elocation would be limited to the few outskirts of town lacking a school or park. Yet the residency restriction would allow a convicted child molester to stroll past the school and eat ice cream in the park—as long as he or she retreats at night to housing far from a school or park. And there, the child molester may live undisturbed next door to small children.”). *See generally* Janicki, *supra* note 61.

127. *In re E.J.*, 47 Cal. 4th at 1263–64 (analyzing a specific challenge to the California Department of Corrections and Rehabilitation’s attempt to enforce residency restrictions as a statutory parole condition).

128. *Id.*

129. *Id.* at 1283–84.

130. *Flores*, 507 U.S. at 302–03 (placing juvenile aliens in custody of government, when they have no available parents, close relative or legal guardian is not a violation of a fundamental right).

131. *Flores*, 507 U.S. at 301 (citation omitted).

132. *See infra* Part V.

V. Practical Problems in Implementation

The courts are willing to overlook the constitutional issues underlying surveillance because the alternative—continued incarceration—is so bleak. However, other factors must weigh in the balance in deciding whether to go forward with this technology. The “technofallacies,” must be addressed.¹³³ First, no studies show conclusively how effective such technology is in deterring crime. A study conducted by UC Irvine’s Center for Evidence-Based Corrections concluded that approximately 40% of a test group of high-risk sex offenders under GPS surveillance committed a parole violation within the first six months.¹³⁴ The California Sex Offender Management Board noted in a report from January 2008 that most sex offenders do not re-offend sexually and, in fact, “recidivism rates for sex offenders are, in reality, *lower* than the re-offense rates for most other types of offenders.”¹³⁵ In a study conducted of 17,000 sex offenders in Illinois, less than 50% were rearrested for any offense up to five years after their release.¹³⁶ Fewer than 10% were re-arrested for any sex offense.¹³⁷ Moreover, when sex offenders reoffend, their targets are usually members of their own household.¹³⁸ California’s Megan’s Law website notes that 90% of child victims know the offender and almost half those offenders are family members.¹³⁹ Therefore, even if law enforcement can track every movement of a convicted sex offender, the technology alone will not prevent a crime from occurring within the offender’s home.¹⁴⁰ Instead, GPS

133. Corbett & Marx, *supra* note 9, at 401–02.

134. SUSAN TURNER, ET AL., UNIV. OF CAL., IRVINE, CTR. FOR EVIDENCE-BASED CORRS., IMPLEMENTATION AND EARLY OUTCOMES FOR THE SAN DIEGO HIGH RISK SEX OFFENDER GPS PILOT PROGRAM 20 (2007) (also noting that general population of parolees tested with GPS indicated same rate of recidivism).

135. CAL. SEX OFFENDER MGMT. BD., INITIAL REPORT, *supra* note 115, at 68. See also Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 26–29 (2008).

136. Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL’Y REV. 83, 93 fig. 1 (2006).

137. *Id.* at 95.

138. Carleen R. Arlidge, *Argument Against Proposition 83*, PROPOSITION 83 OFFICIAL TITLE AND SUMMARY 47, available at www.sos.ca.gov/elections/vig.../proposition_83/entire_prop83.pdf.

139. California Megan’s Law, available at <http://www.meganslaw.ca.gov/facts.aspx> (last visited April 4, 2011).

140. See McLaughlin & Oppmann, *supra* note 7.

technology creates a false sense of security, inducing people to believe it is "some magic bullet or panacea that prevents crimes."¹⁴¹

Additionally, a number of yet unresolved factors hinder effective usage of GPS surveillance. Enforcement requires the cooperation of the offender as well as close supervision by law enforcement.¹⁴² In a report by the Center for Criminal Justice Technology, seven agencies currently administering GPS technology have cited client compliance as one of the biggest challenges they face in implementation.¹⁴³ Offenders must make sure to regularly charge the ankle bracelets, typically twice a day for an hour.¹⁴⁴ The results of a pilot study noted a frequent number of false strap tamper alarms.¹⁴⁵ A Washington State study of parolees wearing GPS bracelets concluded that six percent of the devices were lost or damaged by their wearers.¹⁴⁶ Meanwhile, parole officers must be diligent in monitoring the movements of the offenders.¹⁴⁷ If offenders cut the bracelets off or leave the parole officer's jurisdiction, then law enforcement have no means of tracking them.¹⁴⁸ The UC Irvine study noted:

141. *Id.*; Bulwa, *supra* note 11 (noting that Phillip Craig Garrido wore a GPS ankle bracelet when he was accused of kidnapping Jaycee Dugard in 1991 and imprisoning her in his backyard).

142. TRACY M. L. BROWN, STEVEN A. MCCABE & CHARLES WELLFORD, CENTER FOR CRIMINAL JUSTICE TECHNOLOGY, GLOBAL POSITIONING SYSTEM (GPS) TECHNOLOGY FOR COMMUNITY SUPERVISION: LESSONS LEARNED 2-14 (2007), available at <http://www.justnet.org/Pages/RecordView.aspx?itemid=462> (pointing out various methods used to try and defeat GPS technology, including failing to properly recharge, attempting to disrupt the cellular signal, attempting to damage the bracelet, etc.).

143. *Id.* at 6-9. Agencies include City and County of Denver, Colorado Electronic Monitoring Program; Court Services and Offender Supervision Agency for the District of Columbia; Marion County, Indiana Community Corrections; New Mexico Corrections Department; Oakland County, Michigan Community Corrections; Texas Department of Criminal Justice; and US Pretrial Services, Central District of California.

144. Bulwa, *supra* note 11.

145. TURNER ET AL., *supra* note 134, at 10.

146. Mieszkowski, *supra* note 8.

147. *Id.*; Kris Axtman, *The Move to High-Tech Tracking of Inmates*, CHRISTIAN SCI. MONITOR, May 7, 2004, available at <http://www.csmonitor.com/2004/0507/p02s02-usju.html> ("'[T]here is a chance for human error. I'm not going to argue that point,' says [Lee Kicker, western regional sales manager for Pro-Tech]. 'But you can't strap an ankle bracelet on a guy and then forget about him. It takes a certain amount of diligence on the parole officer's part.'").

148. Michael Rothfeld, *Viability of Sex-Offender Law in Doubt*, L.A. TIMES, Nov. 27, 2007, available at <http://articles.latimes.com/2007/nov/27/local/me-offenders27>.

Parolees with significant mental health issues, especially paranoia, were considered poor candidates, as GPS might cause them to break down. Homeless or transient parolees are also poor candidates, as they cannot comply with the unit charging requirements. Some parolees may have medical issues that make them ineligible. One agent had a parolee with poor circulation whose leg swelled so severely after the GPS unit was applied that he had to be removed from GPS monitoring.¹⁴⁹

Additionally the technology, in its current stage, is not foolproof.¹⁵⁰ As a Verizon Wireless spokesman noted after a technology failure, a probation officer may fail to receive updates if he or she is “outside the coverage area, . . . in an old building with poor reception, . . . [has] the phone turned off or [has] a dead battery”¹⁵¹ Furthermore, the California Sex Offender Management Board noted in its letter advising Secretary Tilton of the California Department of Corrections on how to implement Jessica’s Law that a number of geographic and weather conditions can interrupt a GPS transmission:¹⁵²

1. Terrain – Signals can become degraded and the receiver system may not provide location information if the view of the sky is severely limited. This situation can occur in deep canyons, or under dense vegetation.
2. Urban Canyons – Large or tall buildings grouped closely together can cause large multi-path and fading errors that may affect the ability to track offenders.
3. Vehicles – Signals can be lost when an offender is riding in a car or other enclosed means of transportation if the receiver is not placed near a window within the vehicle.
4. Weather – Signal strength can become degraded by moisture such as rainfall, fog, or snowfall.

GPS satellite signals can also be interrupted by architectural features such as walls, metal struts, masonry and rock.¹⁵³

149. TURNER ET AL., *supra* note 134, at 8.

150. Rebecca Catalanello, *Delayed Text Messages Left Sexual Predator Free to Roam for Hours in Tampa Case*, ST. PETERSBURG TIMES, Jan. 6, 2010, available at <http://www.tampabay.com/news/publicsafety/crime/article1063433.ece>.

151. *Id.* (quoting Jared Reitzin, CEO of MobileStorm, a mobile and e-mail marketing firm, “network congestion is also an increasing problem in the text messaging world that can result in delayed message delivery.”).

152. CAL. SEX OFFENDER MGMT. BD., GPS RESPONSE LETTER, *supra* note 23, at 5.

153. *Id.*

Moreover, GPS enforcement requires increased budgets and a level of supervision that current law enforcement cannot meet. Analysts estimate costs at \$33 per day for the equipment and labor.¹⁵⁴ In California, studies estimate costs at \$9,500 annually per parolee.¹⁵⁵ Most importantly, the state is currently unable to institute surveillance beyond supervised parole or probation. GPS monitoring requires that officers be available twenty-four hours per day to respond to alarms.¹⁵⁶ The UC Irvine study concluded that:

Parole agents found the GPS program very time intensive. Agents devoted considerable time to reviewing the tracks of their parolees through VeriTracks automated system. The dominant implementation challenge during the early months of the GPS program was problems with the equipment. Agents spent a great deal of time investigating false strap tamper alarms and charging problems with the unit.¹⁵⁷

The California Sex Offender Management Board, created through Assembly Bill 1015 to “decrease sexual victimization and increase community safety,”¹⁵⁸ acknowledged in its letter to the California Department of Corrections and Rehabilitation a long list of hindrances to enforcing lifetime surveillance.¹⁵⁹ Its recent report notes that many of these issues remain unresolved, including: whether local or state law enforcement have jurisdiction to monitor individuals beyond the term of supervision.¹⁶⁰

Other negative consequences of GPS monitoring include public hostility and ostracism of a class of society. Human Rights Watch concluded that sex offenders forced to be identified in public registries “endure shattered privacy, social ostracism, diminished employment and housing opportunities, harassment, and even

154. Rothfeld, *supra* note 148.

155. Bulwa, *supra* note 11.

156. Eichar, *supra* note 51, at 289 (discussing specifically parole agents and probation officers in context of enforcement of Chapter 484).

157. TURNER ET AL., *supra* note 134, at 24 (also noting that general population of parolees tested with GPS indicated same rate of recidivism).

158. CAL. SEX OFFENDER MGMT. BD. website, <http://www.casomb.org/>.

159. CAL. SEX OFFENDER MGMT. BD., GPS RESPONSE LETTER, *supra* note 23, at 13–16.

160. CAL. SEX OFFENDER MGMT. BD., RECOMMENDATIONS REPORT, *supra* note 13, at 48.

vigilante violence.”¹⁶¹ One pilot study of GPS monitoring found that the external environment around sex offenders in California is becoming increasingly hostile.¹⁶² In particular, this hostility renders it difficult for sex offenders to find stable housing and they face routine harassment by community members.¹⁶³ Furthermore, this hostility places increased stress on offenders, increasing their likelihood of recidivism.¹⁶⁴ In addition, GPS monitoring could infringe the civil liberties of other populations. The American Civil Liberties Union (“ACLU”) listed “the likely net-widening effect of electronic monitoring programmes” as one of their biggest concerns when they reviewed the issue.¹⁶⁵ Any number of felons could be placed on lifetime surveillance.¹⁶⁶

VI. Possible Solutions

Academics have proposed “intermediate sanctions,” a range of punishments between incarceration and probation, as a solution.¹⁶⁷ A more nuanced system of sentencing could relieve prison overcrowding, while still ensuring public safety. In such a system of diverse punishments and close enforcement, GPS surveillance could be applied to offenders without infringement on constitutional rights. In order to avoid such infringements, law enforcement should use individualized factors to categorize sex offenders on a continuum of

161. HUMAN RIGHTS WATCH REPORT, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 7 (2007).

162. TURNER ET AL., *supra* note 134, at 9.

163. *Id.*

164. *Id.*

165. WHITFIELD, *supra* note 28, at 106 (citing the other major concerns of the ACLU as Fourth Amendment issues, general association and privacy rights, and equal opportunity grounds, noting “[t]agging would discriminate against the poor and people with no homes or telephones.”).

166. MORRIS & TONRY, *supra* note 8, at 218 (“The very confidence we have in the expansion of programs of this type, of their attraction to the judiciary and to correctional administrators, means that they may well be increasingly and needlessly added to the punishment processes of the state. The cheaper they become, the more inclined will some be to add them to punishment after punishment. After all, if the cost is slight, why not make it harder for the offender to avoid his obligations by adding a ‘tracking’ electronic monitor to every probation order, by adding to every punishment a requirement that the offender do something in the future, such as pay a fine on installments? Again we have no sage advice; all one can hope for is that the important desideratum of parsimony in punishment will restrain enthusiasms and respect autonomy.”).

167. *Id.* at 9–33; INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 104–20 (Michael Tonry & Kate Hamilton eds., Ne. Univ. Press 1995).

how dangerous they are to society and apply GPS surveillance selectively. Applying GPS selectively can help ensure successful results. Studies have shown that certain kinds of offenders respond better to electronic monitoring.¹⁶⁸ Defining “success” as completion of monitoring period without reoffending, the following factors were more likely to be found in a successful offender: if used on a first offense; if the offender has well-established family ties and a stable living environment; if the offender has no alcohol or drug abuse problems; and if the offender is employed.¹⁶⁹ Parole agents interviewed in the UC Irvine study found the following to be good candidates for monitoring:

Sex offenders likely to attempt to re-contact past victims . . . smart and manipulative sex offender parolees, sex offenders with frequent parole violations and unstable sex offender parolees working their way through a cycle of precursor behaviors that were leading to re-offending . . . parolee has to be reasonably compliant with parole conditions in order for GPS monitoring to work.¹⁷⁰

The study further suggested that agent caseloads be reduced to 20:1, further agent training, improvement of infrastructure and further organizational adaptations.¹⁷¹ GPS monitoring requires proper law enforcement infrastructure and communication between agencies to be effective.¹⁷²

Conclusion

As of January 2010, all registered sex offenders in California have been equipped with GPS devices. Therefore, a proper analysis of the constitutional issues surrounding electronic surveillance of parolees, probationers, and the released is warranted before further implementation. A survey of relevant case law shows that parolees

168. WHITFIELD, *supra* note 28, at 12–19.

169. *Id.*

170. TURNER ET AL., *supra* note 134, at 8.

171. *Id.* at 25.

172. WHITFIELD, *supra* note 28, at 79–90 (noting that, in addition to getting the technology right and targeting the most appropriate offenders, addressing technology problems, family issues, and cooperation between agencies all contribute to monitoring's success).

have lower expectations of privacy and thus can be subjected to electronic monitoring as an alternative to a longer prison sentence. However, the lowered expectation of privacy lapses once the period of probation or parole expires. Therefore, this note argues that lifetime monitoring extends beyond constitutionally valid surveillance. Moreover, lifetime GPS monitoring poses a potential threat to due process rights and may violate the *ex post facto* clause if applied in a sweeping manner, without consideration for the individual circumstances of each offender.

GPS monitoring is ineffective in deterring crime for a number of reasons. As such, it does not warrant the costs in both money and human resources. Furthermore, successful implementation of GPS monitoring of one class of offenders can easily lead to surveillance of other classes of offenders. Trials in some cities have already expanded the technology to other classes. Ultimately, the use of surveillance technology as a form of punishment will have repercussions on our society, as incarceration will no longer be synonymous with imprisonment.

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